
Small Business Loan Data Collection Proposed Rule (Section 1071) – Comment Letter Guide

Instructions

This document, along with [ICBA's summary of 1071](#), is intended to be a guide as you formulate a comment letter in response to the CFPB's proposed 1071 rulemaking. Your letter does not need to be lengthy or address every component of the proposed rule, but it should be unique to your bank and your community. **The CFPB will not consider form letters.**

Format of letter

Introduction

A typical comment letter begins with an introductory paragraph that provides:

- (1) The reason that you are writing to the CFPB (e.g., *"I am writing regarding the CFPB's proposed rule on 1071..."*)
- (2) A brief background of your bank, your role and the community you serve – include anything that makes your bank special or unique (e.g., *"I am chief compliance officer at Acme First Bank, a \$400 million community bank located in Erie, PA....we primarily provide agricultural loans."*)
- (3) Your abbreviated position on the proposed rule (e.g., *"I am concerned about the proposed rule,"* or *"I object to the proposed rule,"* or *"the proposed rule will negatively impact my bank and community."*)

Comment on specific sections or provisions

After the introduction, your letter can concentrate on specific provisions of the proposed rule on which you would like to comment. The section-by-section analysis (below) should help you focus on questions and issues that you might want to address in your letter.

Conclusion

You can conclude your letter by thanking the CFPB for the opportunity to comment.

Submission

When you have finished drafting your letter, copy and paste it into [\[ICBA's Grassroots Center\]](#), where it will be sent directly to the CFPB. **Comments are due by January 6, 2022.**



Section-by-Section Analysis

Because the [proposed rule is nearly 1,000 pages](#), **you do not need to address every section, provision or component of the proposed rule when drafting your letter.** However, please review each section to see if there are provisions that are particularly burdensome to your bank and warrant a response.

- Scope and coverage (pg. 3 below)
- Definition of “small business” (pg. 5 below)
- Data collection and reporting (pg. 6 below)
- Publication of the data (pg. 8 below)
- Firewall provisions (pg. 9 below)
- Compliance date (pg. 10 below)

Scope and Coverage

Summary

The CFPB is proposing that financial institutions (“FI”) that originate 25 or more small business loans in each of the two preceding calendar years will have to comply with this rule (i.e., collect and report data on credit applications made by small businesses). Although ICBA asked the CFPB to exempt FIs that are below \$1 billion in assets, FIs that are designated as minority depository institutions (“MDI”) or community development financial institutions (“CDFI”), and FIs that are in rural areas, the Bureau is not proposing any exemptions aside from the loan volume threshold of less than 25 loans per year.

Asset size-based exemption

Explain why you support an asset size-based exemption of \$1 billion, and why you oppose a volume-based threshold of 25 or more loans.

Rationale for Position

- An asset size-based exemption would better tailor the rule to community banks’ level of resources and ability to comply with this rule.
- Basing an exemption on asset size would provide assurance of coverage or non-coverage
 - In contrast, an exemption threshold based on volume could vacillate, where a bank might have to incur expenses to comply with the rule for a certain number of years, only to find that it is no longer covered if it starts originating fewer loans.
- Even banks as small as \$50 million in assets will have to comply with this rule if they originate 25 or more loans per year, despite the likelihood of a small staff and manual operation.

Points to Raise

- Illustrate if your bank is a “small” bank that originates more than 25 small business loans per year.
 - Explain your asset size, how many branches your bank has, the number of employees, and what type of loans you originate (i.e., do you originate smaller-balance loans that would be too costly for large FIs to originate?)
- State how many small business loans you originate each year.
- Explain if your bank would consider decreasing the number of small business loans you originate to avoid coverage by this rule.
- Provide examples of how your bank originates small business loans, especially if it does so manually (i.e., no access to special software that helps your bankers originate the loans)

Mission-based exemption

Explain why mission-based banks, such as MDIs and CDFIs, should be excluded from coverage under this rule since they have already demonstrated and received special recognition for serving the small business applicants prioritized under Section 1071.



Rationale for Position

- MDIs and CDFIs play important roles in serving the needs of historically underserved communities or primarily serving low-to-moderate income consumers.
- These statutory designations typically provide FIs with special accommodations in recognition of their service to their communities, such as an exemption from the Qualified Mortgage rule for CDFIs.

Points to Raise

- Explain the community your bank serves and how.
 - Provide examples of special products for small businesses.
- Provide comment on whether your bank already provides capital to minority-owned and woman-owned small businesses as part of its mission and mandate.
- Explain why you believe that your MDI/CDFI bank should be exempt from this rulemaking.

Geographic-based exemption (*applicable to banks located in rural areas*)

Urge the Bureau to exempt rural banks from having to comply with this rule, given that rural small businesses need greater access to credit – not additional barriers.

Rationale for Position

- Community banks in rural parts of the country play an outsized role in providing financial services and products in those communities.
- Community banks in rural areas are often the only insured depository institution in their county or region.
- Losing a bank in rural area due to regulatory burden would be a significant detriment for the small businesses seeking access to credit.
- Of note, banks not located in a metropolitan statistical area (“MSA”) do not have to comply with HMDA, regardless of size or loan volume.

Points to Raise

- Explain why you believe that rural banks should be exempt from this rulemaking.
- Explain if your bank is one of only a few or limited number of banks in the area
- Describe the types of products and services you provide that reflects the type of area you serve.
 - Explain how your bank might not offer these products and services if it were compelled to comply with this rule.

Definition of “Small Business”

Summary

FIs need to collect and report data only on credit applications made by “small businesses.” The CFPB is proposing to define a “small business” as a business that had \$5 million or less in gross annual revenue for its preceding fiscal year. Further, a FI would only be covered by this rule if it originated 25 or more loans to “small businesses” (e.g., if a bank originated a total of 40 business loans, but only 20 were made to businesses with revenues under \$5 million, then the bank would NOT be covered by this proposed rule).

Recommend that the CFPB use revenues when defining “Small Business,” but explain that a \$1 million threshold is more characteristic of a “small” business, especially in certain parts of the country.

Rationale for Position

- A bright-line threshold, such as gross annual revenue, provides a quick and easy way for banks to assess whether they have to start collecting data from the applicants.
- However, a \$5 million threshold is too large and does not appropriately describe a “small business.”
 - For example, depending on the region, a \$5 million business could actually be quite large.
- According to the U.S. Census Bureau, a \$1 million revenue threshold would cover 95 percent of all businesses.¹

Points to Raise

- Explain why using the bright-line test of using revenue to determine whether your bank will have to collect data on an applicant is beneficial.
- Provide comment on why a revenue of \$5 million threshold is too high and why that is not indicative a small business in your community.
 - Provide an example of the average size business loan you currently make.
 - Provide an example of the average revenue of the businesses you currently serve.
- Explain how a \$5 million threshold essentially covers all business loans you make, thereby negating the distinction of loans to “small” businesses.

¹ U.S. Census Bureau, Statistics for All U.S. Firms with Paid Employees by Industry, Gender, and Employment Size of Firm for the U.S. and States: 2012 More Information 2012 Survey of Business Owners, American Fact Finder, (last visited Feb 27, 2017), available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSA09&prodType=table/

Data Collection and Reporting

Summary

Covered FIs would be required to compile and maintain numerous datapoints from small business loan applications. An FI may rely on statements from the applicant when compiling data, unless it verifies the information provided, in which case it shall use the verified information. The Bureau proposes that a covered FI maintain procedures to collect the following information at a time and in a manner that is reasonably designed to obtain a response.

**Please review [ICBA's Summary of Section 1071](#) for a full list of mandatory datapoints that the CFPB proposes for banks to collect and report. Only select datapoints are discussed here.*

Ethnicity, race and sex

Recommend that the Bureau remove the requirement for banks to guess an applicant's race and ethnicity based on visual observation.

Rationale for Position

- While most of the datapoints provide the FI with a field option to record that an applicant “did not provide” or “declined to provide” the requested information, the FI would be required to guess the race and ethnicity of the principal owner of the applicant based on a visual assessment or surname analysis if meeting with the applicant in-person.
- This proposed provision would not only put the bank and the customer in an uncomfortable situation, but fintechs and big banks likely will not be burdened by this requirement, given their reliance on automated and online applications.

Points to Raise

- Describe how your loan officers would feel if they had to guess the race and ethnicity of the principal owner(s) of a small business applicant.
 - Explain how the guesses likely would not be accurate and how that would create “bad data” for the Bureau.
- Explain how examiners review your bank and whether it would be likely for them to scrutinize your guesses.
- Separate from the comfort level of your loan officers, provide your opinion on how uncomfortable your small businesses applicants would feel if their demographic information were guessed.

Pricing information

While recommending that the Bureau remove all the discretionary datapoints, emphasize the removal of pricing information as a datapoint.

Rationale for Position

- Although this information is likely to already be known to a bank, reporting this information that ultimately becomes public will create:



- competitive risks for the bank,
- privacy risks for the customer, and
- misconceptions about the underlying rationale for pricing.

Points to Raise

- Describe why it would be disadvantageous for competitors to know how you price your loans.
- Explain how small business customers would be upset to learn that the terms of their loan were made public by being reversed-engineered.
- Provide examples of reasons that some loans are priced higher than others.
 - For example, explain how credit risk, collateral, or complexity of the deal all lead to different pricing terms.
- Explain how publishing pricing information will lead to erroneous conclusions from the public.
 - For example, examiners would have access to contextualizing information (collateral, credit profile, etc.) that the general public does not.

NAICS Code

Urge the removal of the NAICS code datapoint – it is not mandated by statute and its publication will raise significant risk of re-identification for small business applicants.

Rationale for Position

- The North American Industry Classification System (“NAICS”) is a six-digit code that is used to classify and categorize businesses based on their industry, service, or product.
 - For example, through a NAICS code, it is possible to determine that a business is a motor vehicle dealer, a retail store, a health care provider, etc.
- There are nearly 1,100 NAICS codes available.
- Some banks are unfamiliar with NAICS codes and it would be difficult for them to start collecting.
- Finally, publication of their NAICS, along with the applicant’s census tract, will provide opportunities for re-identification, especially in rural areas.

Points to Raise

- Explain that you do not currently collect NAICS codes from small business customers.
- *(If you are located in a rural area)* Explain that there is a limited number of each type of business (e.g., one car dealership, one or two doctors’ offices, etc.).
 - Illustrate the relative ease for the public to identify your customers based on their NAICS code and census tract.
 - Explain how your customers feel if they knew there was a risk that their loan terms would be reversed-engineered or re-identified.

Publication of the Data

Summary

The proposed rule would require covered FIs to annually report data collected from their small business applicants to the CFPB. Though 1071 requires the publication of the data, the Bureau has authority and discretion to not publish datapoints that pose an undue privacy risk (i.e., high potential to identify applicants from anonymized data). The Bureau will employ a privacy-balancing test to determine which data it will make publicly available, but it is not publishing the methodology for that test until the rule is final and the data has already been collected.

Urge the Bureau to aggregate certain datapoints, especially data that can be used to re-identify small business applicants. Explain how privacy concerns are paramount to small business applicants and that publication of their data, especially in rural areas, will pose an undue risk.

Rationale for Position

- Privacy concerns are a high priority among many community banks.
- Their customers take their privacy seriously and will be dismayed if their information is made public.
- Though the information will not contain personally identifiable information (“PII”), the data can nonetheless be reverse-engineered, and the applicant can be re-identified through certain datapoints, such as the combination of the NAICS code and the census tract of the applicant.

Points to Raise

- Explain your concern for your customer’s privacy, as well as their concern about their own privacy.
 - Describe the concern that small businesses had about their data being published in PPP (if applicable).
- (If you operate in a rural area) Illustrate how a small business might be concerned if its NAICS code and census tract were published.
- Provide feedback on which datapoints should not be published in order to maintain your customers’ privacy.

Firewall Provisions

Summary

Referred to as a “firewall,” the proposed rule would require FIs to restrict the access of certain individuals (underwriters, employees making a determination relating to an application, etc.) to certain race or demographic information provided by an applicant.

If a FI determines that an employee “should have access” to covered information, or cannot feasibly segregate the information, then it must provide a notice to the applicant of the underwriter’s access to such information, along with notice that the financial institution may not discriminate on the basis of such information.

Explain that the firewall provision is another reason to exempt community banks from coverage, describing how the inability to firewall information will serve as a competitive disadvantage for smaller community banks.

Rationale for Position

- Community banks are relatively small and do not have enough staff to feasibly firewall the demographic information.
- Although the proposed rule would provide an exemption to the firewall requirements for financial institutions that cannot “feasibly” comply with the requirement, providing the applicant with notice of that fact could raise questions or doubts in the mind of the applicant as to the impartiality of the credit decision.

Points to Raise

- Explain whether your bank will be able to firewall demographic information away from underwriters.
 - You may want to highlight the number of employees your bank has in responding to your ability to firewall information.
- Describe how complying with the firewall provision will adversely affect your bank.
 - For example, if you provided notice to an applicant that their race, sex, or ethnicity were being shared with the underwriter, the applicant might become suspicious of whether their demographic information played a role in the credit decision.
- Because large FIs and fintechs will be able to comply with the firewall (and as such, not be required to provide applicants with a notice of non-compliance), explain how smaller banks might have a competitive disadvantage because of this requirement.

Compliance Date

Summary

The CFPB is proposing to set the compliance date for the rule approximately 18 months after the date of publication of the final rule in the Federal Register.

Urge the Bureau to establish a 30-month compliance deadline, or in the alternative, stagger the compliance date by providing smaller financial institutions more time to comply with the rule after unanticipated issues are resolved.

Rationale for Position

- While some larger FIs might have internal staff to develop systems to comply with a final rule, most community banks will have to rely upon vendors and software.
- Given this is an entirely new regulatory paradigm, there is no software currently in the market to comply with this rule.

Points to Raise

- *(If your bank is not a HMDA filer)* Discuss how your bank is not experienced with
- data collection and reporting regulations.
- Illustrate how your bank would comply with this rule and how long preparation would take, detailing the difficulty of compliance.
- Explain how your bank's software is typically licensed or bought from a third party.
- Because this rule is not yet final, there are currently no vendors that offer a software solution to comply with this rule.
 - Explain in your letter how you are required to conduct due diligence on new third party relationships and how long that due diligence takes.
- If you had to on-board a new vendor, explain how long it would take your bank to:
 - find an appropriate vendor,
 - conduct due diligence,
 - integrate the vendor's software with your existing software, and
 - train your staff on the new software.
- Provide any negative experiences when on-boarding vendors in response to HMDA expansion or compliance with TRID.
- Larger banks generally have more resources to dedicate toward compliance with new rulemaking and can serve as early test-cases and lessons learned from compliance with the rule.

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Comments are due by January 6, 2022**